IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 351 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether Their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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SHASHTRI HARIPRIYADASJI GURU PURANI HARIBALDASJI – Applicant

Versus

SWAMI DEVNANDANDASJI GURU SHASHTRI BHAGWAT SWARUPDASJI AND OTHERS - Respondents

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Appearance :

MR RC KAKKAD for Applicant.
MR MEHUL S SHAH for Respondent Nos. : 1 - 2.
MS NANDINI JOSHI, ADDITIONAL PUBLIC PROSECUTOR for Respondent No. 3

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CORAM : HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 01/05/2006 AND 02/05/2006

ORAL JUDGMENT

1. This Revision Application is preferred by the petitioner under Section 397 read with Section 401 of the Code of Criminal Procedure, wherein prayer is made to

quash and set aside the judgment and order dated 28-02-2005 passed in Criminal Revision Application No. 14 of 2004 by the learned Additional Session Judge, 9th Fast Track Court, Junagadh, who in turn set aside the issuance of process dated 15-01-2004 passed by the Judicial Magistrate (First Class), Junagadh in Criminal Case No. 255 of 2004.

2. Mr. R. C. Kakkad, learned Advocate for the applicant, submitted that the order passed by the learned Additional Session Judge is erroneous and bad in law and, therefore, it requires to be set aside. The learned Advocate submitted that the learned Additional Session Judge ought to have appreciated the reasoning assigned by the learned Judicial Magistrate (First Class) in issuing summons in proper perspective and ought to have held that the order of the issuance of summons is an “interlocutory order” and it cannot be termed as “final order”. The learned Judge ought to have held that no case is made out by original accused Nos. 3 and 4 which would warrant any interference in a Revision Application and, therefore, the learned Judge ought to have dismissed the Revision Application. In view of the aforesaid facts and circumstances, the learned Advocate submitted that the

order passed by the learned Additional Sessions Judge requires to be quashed and set aside.

3. Mr. Kakkad, learned Advocate for the petitioner, has placed reliance on the following judgments in support of the submissions made at the bar:

(i) Adalat Prasad Vs. Rooplal Jindal And Others, (2004) 7 SCC 338.

The learned Advocate submitted that the Apex Court, while considering the provisions of Sections 200, 202 and 203 of the Code, held that if a Magistrate takes a cognizance of an offence and issues process without their being any allegation against the accused or any material implicating the accused or in contravention of the provisions of Sections 200 and 202, the order of Magistrate may be vitiated, but then the relief an aggrieved accused can avail of, at that stage, is not by invoking Section 203 of the Code because the Code does not contemplate a review of an order. Hence, in absence of any review

power or inherent power with the subordinate Criminal Courts, the remedy lies in invoking Section 482 of the Code.

(ii) Subramanium Sethuraman Vs. State of Maharashtra And Another, 2005 SCC (Cri) 242.

The learned Advocate submission that the Apex Court held that once the process is issued under Section 204 of the Code of Criminal Procedure, then the remedy available to the person or the aggrieved accused is the extra-ordinary remedy under Section 482 and not by way of application to recall the summons or to seek discharge, the later not being contemplated in trial in a summons case. It is further held by the Hon'ble Apex Court that the issuance of process under Section 204 is a preliminary step in the stage of trial contemplated in Chapter XX of the Code of Criminal Procedure and is, therefore, an interlocutory order.

The learned Advocate for the applicant submitted that in view of the ratio laid down in the above

mentioned judgments, the proper course for the aggrieved party is to approach the High Court by invoking the provisions contained in Section 482 of the Code. This Court, while exercising powers in a Revision Application under Section 397 read with Section 401, cannot upset or reverse the order of issuance of process by the learned Magistrate. Thus, the learned Advocate submitted that in view of the clear legal position, the order dated 28-02-2005 passed by the learned Additional Session Judge be quashed and set aside.

4. Mr. Mehul R. Shah, learned Advocate representing respondent Nos. 1 and 2, submitted that the learned Additional Session Judge has in the Revision Application rightly held that respondent Nos. 1 and 2 have been falsely implicated in the commission of offence and, therefore, issuance of process resorted to by the learned Magistrate was not just and proper. The learned Judge of the Revisional Court has taken into consideration the complaint dated 28-12-2002, the deposition given by the complainant and the case papers submitted by the police, and held that, save and except the complaint, the deposition of the complainant and the case papers, no other evidence worth the name was produced in support of

the complaint given by the complainant. Thus, the learned Judge of the Revisional Court rightly held that the facts which were mentioned in the complaint, were reiterated by the complainant in his deposition and only on the basis of the complaint and the deposition adduced by the complainant, process was issued by the Trial Court and, therefore, it was rightly set aside by the learned Judge of the Revisional Court. As no illegality or impropriety is committed by the learned Judge of the Revisional Court while passing the order, no interference is called for under Section 397 read with Section 401 of the Code.

5. Mr. Shah, learned Advocate for respondent Nos. 1 and 2, has placed reliance on the following judgments in support of the submissions canvassed at the bar:

(i) **Vadilal Panchal Vs. Dattatraya Dulaji Ghadigaonkar And Another, AIR 1960 SC 1113.**

The judgment is cited by the learned Advocate to highlight the scheme as provided under Sections 200, 202 and 203 of the Code of Criminal Procedure. The Apex Court,

while considering these sections, held that when a Magistrate directs enquiry under Section 202 of the Code of Criminal Procedure for ascertaining the truth or falsehood of a complaint and receives a report from the enquiring officer supporting a plea of self-defence made by the person complained against, it is open to him to hold that the plea is correct on the basis of the report and the statement of witnesses recorded by the enquiring officer. It is not obligatory on the Magistrate, as a matter of law, to issue process in such a case and leave the person complained against to establish his plea of self-defence at the trial. Section 203 makes it clear that the judgment, which the Magistrate has to form, must be based on the statements of the complainant and his witnesses and the result of the investigation or inquiry. But the judgment which the Magistrate has to form is whether or not there is sufficient ground for proceeding. This does not mean that the Magistrate is bound to accept the result of the enquiry or investigation or that he must accept any plea

that is set up on behalf of the person complained against. The Magistrate must apply his judicial mind to the material on which he has to form his judgment. In arriving at his judgment, he is not fettered in any way except by judicial considerations and he is not bound to accept what the enquiry officer says nor is he precluded from accepting the plea based on an exception provided always there are satisfactory and reliable materials on which he can base his judgment as to whether there is sufficient ground for proceeding on the complaint or not. If the Magistrate has not misdirected himself as to the scope of an inquiry under Section 202 and has applied his mind judicially to the materials before him, it would be erroneous in law to hold that a plea based on an exception can never be accepted by him in arriving at his judgment. What bearing such a plea has on the case of the complainant and his witnesses, to what extent they are falsified by the evidence of other witnesses – all these are questions which must be answered with reference to the facts of each case and no universal rule can be laid down in

respect thereof.

(ii) **Madhu Limaya Vs. State of Maharashtra, AIR 1978 SC 47.**

The learned Advocate cited the case, wherein the Apex Court had the occasion to consider Sections 482 and Section 397 (2) of the Code of Criminal Procedure as well as the bar provided under Section 397 (2) of the Code. The Apex Court stated the following principles in relation to the exercise of the inherent powers of the High Court:

(a) That the power is not to be resorted to if there is a specific provision in the Code for the redress of the grievance of the aggrieved party;

(b) That it should be exercised very sparingly to prevent abuse of process of any Court or otherwise to secure the ends of justice;

(c) That it should not be exercised as against the express bar of law engrafted in any other provision of the Code.

The learned Advocate further placed reliance on head-note (B) of the judgment in order to highlight the meaning of word “interlocutory order” as provided under Section

397 (2) of the Code. In the matter before the Apex Court, the order, rejecting the application challenging the jurisdiction of the Court to proceed with the trial, came up for consideration. The Supreme Court held that it cannot be termed as an “interlocutory order.”

(iii) **Amar Nath And Others Vs. State of Haryana and Others, AIR 1977 SC 2185.**

The decision rendered in this case is relied upon by the learned Advocate in support of the submission that the Hon'ble Apex Court has interpreted the word “interlocutory order” in Section 397 (2) of the Code so as to be used in a restricted sense and not in any broad or artistic sense. It merely denotes orders of purely interim or temporary nature which do not decide or touch the important rights or liabilities of the parties. Any order which substantially affects the right of the accused, or decides certain rights of the parties, cannot be said to be an interlocutory so as to bar revision to the High Court against

that order, because that would be against the very object which formed the basis for insertion of this particular provision in Section 397. The orders, which are matters of moment and which affect or adjudicate the rights of the accused or a particular aspect of the Trial Court, cannot be said to be interlocutory so as to be outside the purview of the revisional jurisdiction of the High Court. Thus, taking into consideration the aforesaid ratio laid down by the Apex Court, the learned Advocate submitted that the order passed by the Trial Court could adjudicate the rights of the party and, therefore, it was rightly set aside by Revisional Court.

(iv) **V. C. Shukla Vs. State through CBI, AIR 1980 SC 962.**

This judgment is cited to highlight the expression “interlocutory” as provided under Section 397 (2) of the Code of Criminal Procedure. The Apex Court also considered the provisions contained in Section

11 (1) of the Special Courts Act, 1979. While considering the aforesaid provisions, the Apex Court held that the expression in Section 11 (1) of the Special Courts Act has been used in a natural sense and not in a wider sense, as used in Section 397 (2) of the Code of Criminal Procedure. The Apex Court further held that the order for framing of the charge is an interlocutory order and appeal against the same is incompetent.

(v) **Punjab National Bank And Others Vs. Surendra Prasad Sinha, AIR 1992 SC 1815.**

This judgment is relied upon by the learned Advocate in support of the submission as to what relevant facts and circumstances are required to be considered before issuing process under Section 204 of the Code. If the process is issued in a mechanical manner on the basis of the complaint filed as vendetta to harass persons, then such complaint can be quashed. It is held by the Apex Court that judicial process should not be an

instrument in the hands of private complainant as vendetta to harass the persons needlessly.

(vi) **Rajendra Kumar Sitaram Pande and Others Vs. Uttam and Another, AIR 1999 SC 1028.**

This judgment is relied on by the learned Advocate in support of the submission that a revision preferred against the order of issuance of process under Section 204 is not purely interlocutory order and, therefore, the bar, as provided, under Section 397 (2) of the Code of Criminal Procedure is not applicable. Thus, the revision preferred against the issuance of process under Section 204 is maintainable.

(vii) **K. K. Patel And Another Vs. State of Gujarat and Another, AIR 2000 SC 3346.**

In this case, the Apex Court, after considering the provisions contained in Section 397 (2) read with Section 197 of the Code, held that in view of the bar contained in

Section 397 (2) of the Code, no revision is maintainable against an interlocutory order. In deciding whether the order challenged is an interlocutory order or not, under Section 397 (2) of the Code, the sole test is not whether such order was passed during the interim stage. The feasible test is whether by upholding the objections raised by a party, would it result in culminating the proceedings, if so, any order passed on such objections would not be merely interlocutory in nature, as envisaged under Section 397 (2) of the Code. Thus, if proceedings are culminated, then such order cannot be termed as interlocutory order as mentioned in Section 397 (2) of the Code.

(viii) **Poonam Chand Jain And Another Vs. Fazru, AIR 2005 SC 38.**

This case is cited in support of the submission that issuance of process under Section 204 of the Code cannot be reviewed or reconsidered and in a given case, the provisions contained in Section 482 can be pressed into

service.

Thus, the learned Advocate submitted that considering the ratio laid down in the above mentioned judgments, the applicant has not made out a case for the grant of relief, as set out in the Revision Application, and as the Criminal Revision Application is devoid of merits, the same is liable to be rejected out of hand.

6. The contention raised by the learned Advocate on behalf of respondent Nos. 1 and 2 that the order of issuance of process under Section 204 of the Code is an interlocutory order has no substance. On perusal of Chapters XV and XVI of the Code of Criminal Procedure, procedure is prescribed under Sections 200 to 210 when a Magistrate takes cognizance of the offence on a complaint. Section 200 is with regard to the examination of the complainant by the Magistrate. On the cognizance being taken by the Magistrate of an offence, the Magistrate shall examine upon oath the complainant and the witnesses present and the substance of the same shall be reduced into writing and signed by the complainant and the witnesses. Section 201 prescribes the procedure by the Magistrate not competent to take cognizance of the

case. If the complaint is made, as per Section 201, to a Magistrate, who is not competent to take cognizance of the offence then he shall if the complaint is in writing, return it for presentation to the proper Court with an endorsement to that effect; and, secondly, if the complaint is not in writing, direct the complainant to the proper Court. Section 202 prescribes the procedure by the Magistrate on receipt of the complaint of an offence of which he is authorised to take cognizance or which has been made over to him under Section 192. The Magistrate, if he thinks fit, may postpone the issue of process against the accused and either inquire into the case himself or direct an investigation to be made by a Police Officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding with the matter. Section 203 provides for dismissal of the complaint. It is stated therein that, if, after considering the statements on oath, if any, of the complainant and of the witnesses and the result of inquiry or investigation, if any, under Section 202, the Magistrate is of the opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case, he shall briefly record his reasons for so doing. Section

204 is with regard to issuance of process. It is stated therein that, if in the opinion of the Magistrate taking cognizance of the offence, there is sufficient ground for proceeding, and the case appears to be a summons-case, he shall issue summons for the attendance of the accused, or if it is a warrant-case, he may issue a warrant, or if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or if he has no jurisdiction himself, some other Magistrate having jurisdiction. While Section 205 empowers the Magistrate to dispense with personal attendance of the accused, Section 206 deals with the special summons in case of petty offences. Section 207 deals with supply to the accused of copy of police report and other documents while Section 208 deals with the supply of copies of statements and documents to accused in other cases triable by Court of Session. Section 209 deals with commitment of case to Court of Session when offence is triable exclusively by it and Section 210 prescribes the procedure to be followed when there is a complaint case and police investigation in respect of the same offence.

7. The Trial Court, after examining the complainant and perusing the complaint and the police papers produced in the case, issued process under Section 204 of the Code. The Trial Court, on the basis of the material placed before it, found that it was *prima facie* case for issuing process and, therefore, the process under Section 204 of the Code was issued. The Trial Court, by issuing the process, allowed the proceedings to go on and the order cannot be treated as final but interlocutory, therefore, the revision preferred against the order would be barred under Section 397 (2) of the Code. In view of the decision rendered by the Apex Court in **Subramanium Sethuraman Vs. State of Maharashtra And Another** *(supra),* issuance of process under Section 204 is preliminary step in the stage of trial contemplated in Chapter XX of the Code. Such order, made at the preliminary stage being interlocutory order, cannot be reviewed or reconsidered by the Magistrate, there being no provision under the Code for review of the order by the said Court. Hence, it is impermissible for the Magistrate to reconsider his decision to issue process in absence of specific provisions to recall such order and, therefore, it is held by the Apex Court that the only remedy, which is

available to the aggrieved party or the accused, is the extraordinary remedy under Section 482 and not by way of application to recall the summons or to seek discharge, the later not being contemplated in the trial of a summons case. The Apex Court also considered the ratio laid down in *Adalat Prasad's* case. Therefore, in view of the ratio laid down by the Apex Court, the only recourse available to challenge issuance of process under Section 204 of the Code is by way of petition under Section 482 of the Code. The other judgments cited and relied upon by the learned Advocate for respondent Nos. 1 and 2 are not applicable to the facts of the present case.

8. In a revision under Section 397, the Court can definitely consider the correctness, legality or propriety of the order passed by the Revisional Court. In view of the aforesaid facts and circumstances of the case, this Court can examine the legality and propriety of the order passed by the Revisional Court and, therefore, the revision, in my view, would be maintainable. The Trial Court, as per my discussion hereinabove, after examining the complainant, the complaint and other police papers, had issued the process and, therefore, the order passed by the Trial Court was

just and proper and there was no need by the Revisional Court to interfere with the order passed by the Trial Court.

9. For the foregoing discussion, the Revision Application shall have to be allowed. The order dated 28-02-2005 passed by the learned Additional Sessions Judge, 9th Fast Track Court, Junagadh in Criminal Revision Application No. 14 of 2004, by which the learned Judge set aside the process dated 15-01-2004 issued against respondent Nos. 1 and 2 – original accused Nos. 3 and 4, is hereby quashed and set aside. Rule is made absolute.

10. Mr. Mehul Shah, learned Advocate for respondent Nos. 1 and 2, makes a request that he may be permitted to challenge the order dated 15-01-2004 passed by the learned Civil Judge (Senior Division) and Judicial Magistrate (First Class), Junagadh by way of filing Criminal Miscellaneous Application under Section 482 of the Code. This request is strongly opposed by Mr. R. C. Kakkad, learned Advocate for the applicant. This Court, while disposing of the Revision Application, cannot give such type of permission. However, the statutory right or remedy, which is available to the aggrieved party in law,

cannot at the same time be denied to him. In view of the aforesaid facts and circumstances, it would be open for the learned Advocate to resort to the remedy which is available to him against the order passed by the learned Magistrate.

[H. B. ANTANI, J.]

/shamnath